

STATE OF MAINE

DIRIGO HEALTH AGENCY

RE: DETERMINATION OF)	THE MAINE STATE CHAMBER
AGGREGATE MEASURABLE)	OF COMMERCE APPLICATION
COST SAVING FOR THE SECOND)	TO INTERVENE AND
ASSESSMENT YEAR (2007))	OBJECTION TO PROVISIONS IN
)	THE NOTICE AND DRAFT
)	PROCEDURAL ORDER

NOW COMES the Maine State Chamber of Commerce (the "Chamber"), by and through its attorneys, and, pursuant to the Notice of Pending Proceeding and Hearing dated January 27, 2006 (the "Notice"), and 5 M.R.S.A. §9054(1), requests, as a matter of right, full party intervenor status as set forth below. In addition, the Chamber hereby objects to certain provisions in the Notice and the draft Procedural Order (the "Draft Order") issued by the Board of Directors of the Dirigo Health Agency (the "Board").

I. The Chamber Qualifies for Intervenor Status Because the Chamber and its Members Will Be Substantially and Directly Affected by this Proceeding

The Chamber is a statewide business association that represents Maine businesses both large and small. The Chamber's members include large businesses that provide group health coverage for their employees through self-funded plans, as well as businesses that provide employee health coverage through insured plans. The Chamber itself also has an insured health plan for its own employees.

The Notice states that the Board will be holding an adjudicatory hearing "on the determination of aggregate measurable cost savings" The determination of aggregate measurable cost savings serves as a justification for, and limitation on, an assessment levied against health insurance carriers, employee benefit excess insurance carriers and third-party

administrators (“TPA’s”). This assessment is known as the “savings offset payment” amount (hereinafter “SOP”).

Although the SOP will be levied directly against health insurance carriers, TPA’s, and employee excess benefit insurance carriers, it is Maine employers and their employees who will ultimately pay the SOP because premium rates for health insurance carriers and employee excess benefit insurance carriers include the SOP, and TPA administrative fees also include the SOP. As such, the aggregate measurable costs savings and resultant SOP will have tremendous impact on Maine’s business community because the ability of Maine employers to offer health care coverage is already threatened by the high costs of health care and health insurance in Maine. Any increase in premium rates as a result of an inflated savings determination will serve to make health insurance even more unaffordable. Accordingly, due to the already high-cost of health care, and the impact of cost increases on the ability of Maine employers to offer health insurance, Maine employers have a direct and substantial interest in ensuring that aggregate measurable savings are accurately measured.

As explained above, every employer in Maine that provides health care coverage to its employees (whether self-funded or insured) will be substantially and directly affected by the determination of aggregate measurable cost savings. Therefore, the Chamber, both on behalf of its members and in its own right as an employer, respectfully requests that its Application to Intervene as a matter of right, with full party status, be granted.

II. The Notice and Draft Procedural Order Improperly Place Conditions on Intervenor Status that are Unsupported by the Maine Administrative Procedures Act

24-A M.R.S.A. § 6913(1)(A) requires the Board to hold an adjudicatory hearing to determine “the aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of

Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.” Thus, the Board published a Notice of Pending Proceeding and Hearing, but failed to notify interested parties that, pursuant to 5 M.R.S.A. § 9051 et seq. (hereinafter “APA”), the Board will be holding an adjudicatory hearing “to adopt a methodology for the determination of aggregate measurable cost savings, and, using that methodology, determine aggregate measurable cost savings” Notice at paragraph 2.

The APA requires administrative agencies to allow public participation in adjudicatory hearings. Specifically, the APA provides:

On timely application made pursuant to agency rules, the agency conducting the proceedings shall allow any person showing that he is or may be . . . substantially and directly affected by the proceeding, . . . to intervene as a party to the proceeding.

5 M.R.S.A. § 9054(1). Thus, to participate as a party in an adjudicatory hearing as a matter of right, the party need only demonstrate that they are, or may be, “substantially and directly affected by the proceeding.” 5 M.R.S.A. § 9054(1).

As required by the APA, paragraph 3 of the Notice contains information concerning the right of intervention. However, the Notice appears to place additional conditions on the participation of interested parties, conditions that are not supported by the APA, nor any promulgated rules of the Dirigo Health agency. Specifically, the Notice states in part:

Only persons willing to undertake the responsibilities placed upon parties to an adjudicatory proceeding under this notice and any procedural orders issued by the Board should seek intervenor status. These responsibilities include . . . the presentation of a methodology to be considered by the Board; the presentation of the components to be included in aggregate measurable cost savings; the presentation of credible, reliable and accurate data to support the amount of aggregate measurable cost savings derived from that methodology”

Notice at paragraph 3 (emphasis added).¹ The additional requirements, called “responsibilities,” placed upon interested parties by the Board’s Notice find no support in the APA. Indeed, once a party demonstrates it is or may be substantially and directly affected by the proceeding, that party has a right to participate and “present evidence and arguments on all issues.” 5 M.R.S.A. § 9056(2). Not surprisingly, the APA does not require interested parties to present substantive evidence and argument in support of a certain position as a condition of participation, and indeed it could not in light of due process. In addition, the Board can point to no support for additional requirements on participation in its own administrative hearing regulations because the Board has yet to promulgate and adopt any.

It is Dirigo Health that is charged with providing comprehensive, affordable health care coverage and, through its Board, determining aggregate measurable cost savings. See 24-A M.R.S.A. §§ 6902, 6913(1)(A). The law does not place this responsibility on interested parties. This is logical because only Dirigo Health has access to enrollment data and other information relevant to any reduction in bad debt and charity care as a result of the operation of Dirigo Health. Moreover, requiring intervening parties to present evidence regarding a methodology for determining savings assumes that all intervening parties agree that there is in fact savings. The Chamber suspects that not all parties will agree that there is savings as a result of Dirigo Health. Even if a party believes that Dirigo has resulted in some savings, there is no requirement in § 6913(1)(A) or the APA that a party must present a methodology to measure savings, and a decision to refrain from presenting a methodology may not disqualify a party from participating in this public hearing. Such a result would operate to limit public participation, contrary to the requirements of the APA. See 5 M.R.S.A. § 9056(2).

¹ These requirements are incorporated into paragraph 1 of the draft Procedural Order.

Accordingly, the Chamber objects to the additional responsibilities placed on interested parties as a condition of participation in this adjudicatory hearing. The Board lacks the authority to place such additional responsibilities under the APA and, therefore, may not impose such requirements as a matter of law. In addition, because the additional responsibilities assume that a party agrees there are savings, and because enrollment and other information relevant to bad debt and charity care is within the possession of Dirigo Health, it is unfair and violative of due process to place these conditions on interested parties. Therefore, the Chamber respectfully requests the Board to strike the following language from the Notice:

These responsibilities include . . . the presentation of a methodology to be considered by the Board; the presentation of the components to be included in aggregate measurable cost savings; the presentation of credible, reliable and accurate data to support the amount of aggregate measurable cost savings derived from that methodology . . .

III. The Draft Procedural Order Sets Forth a Schedule of Proceeding that is Contrary to Due Process of Law

Although agencies enjoy discretion in adopting rules of procedure or practice relative to agency proceedings, the procedures adopted must be within the bounds of fair play. In re Maine Clean Fuels, Inc., 310 A.2d 736, 744 (Me. 1973). As explained below, the Board's draft schedule of proceeding, which notably was not adopted under the APA as a rule, sets forth a procedure that is unfair and will result in substantial prejudice to interested parties. See Draft Procedural Order attached hereto as **Exhibit A**.

As noted above, the Dirigo Health Board is charged with determining aggregate measurable cost savings. See 24-A M.R.S.A. § 6913(1)(A). Therefore, it is incumbent upon Dirigo Health to develop and present a methodology for calculating aggregate measurable cost savings, especially since only Dirigo Health has unfettered access to enrollment and other data related to the operation of Dirigo Health. The Chamber's interest in this proceeding is to ensure

that the methodology offered by Dirigo Health will accurately measure savings, and will not serve as the basis for an inflated and unjustified SOP. However, the procedure established by the Board in the Draft Order will operate to deny interested parties such as the Chamber the opportunity to meaningfully participate in the proceeding to ensure that the methodology offered by Dirigo Health is sound.

For instance, the Board's draft procedure provides for no discovery, and requires intervening parties to provide documentation and designate witnesses (including expected expert witnesses) before Dirigo Health is required to identify its methodology and provide supporting data. Furthermore, intervening parties would be required to file pre-filed testimony and all exhibits only two days after the parties learn, for the first time, Dirigo Health's methodology and supporting data. How can the Chamber and other interested parties be expected to know what documents to produce, what experts may be needed, and what their expert's opinions will be until the Chamber and other interested parties discover Dirigo Health's proposed methodology for calculating savings? In light of the year one (1) proceeding, it appears that the Board has developed a procedure designed to preclude any intervening party from the ability to discover, and meaningfully analyze and critique Dirigo Health's proposed methodology for determining savings. This procedure does not pass muster under due process of law.

Consistent with due process, and to permit meaningful participation by interested parties, Dirigo Health's proposed methodology to calculate savings, supporting data, and estimate of aggregate measurable cost savings must be available to interested parties at least one month before parties are required to designate witnesses and submit pre-filed testimony. Dirigo Health has had years to develop a methodology, and spent approximately \$1 million dollars on

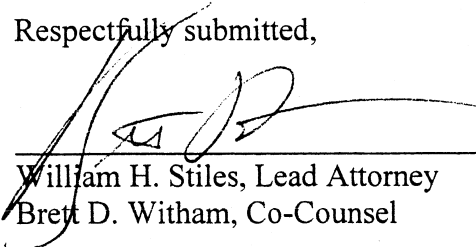
consultants to develop a method for year one (1). Surely Dirigo Health can produce its year two (2) methodology to interested parties in advance to permit meaningful review.

In addition, the Chamber objects to certain requirements in paragraph 3 of the Draft Order. This proceeding is meant to be an agency proceeding, not a court hearing. The wholesale transplantation of requirements relating to expert disclosures provided by M.R.Civ.P. 26(b)(4) is, as explained above, unfair in light of the timeframe, unduly burdensome in the context of this administrative hearing, and redundant in light of other requirements set forth in the Draft Order. Finally, subpart e, to paragraph 3 also should be stricken as explained in argument at section II above.

The Chamber respectfully requests the Board to adopt a hearing procedure similar to the procedure before the Superintendent, whereby interested parties had access to Dirigo Health's methodology, supporting data, and determination of aggregate measurable cost savings well in advance of the hearing,² and were afforded the opportunity for discovery. Specifically, the Chamber requests that the Board adopt the schedule of proceeding set forth in the attached proposed order.

Dated: February 9, 2006

Respectfully submitted,



William H. Stiles, Lead Attorney
Brett D. Witham, Co-Counsel

Counsel for the Maine State Chamber
of Commerce

² The Chamber notes that the proceeding before the Superintendent of Insurance afforded parties five (5) weeks to review Dirigo Health's determination of aggregate measurable cost savings.

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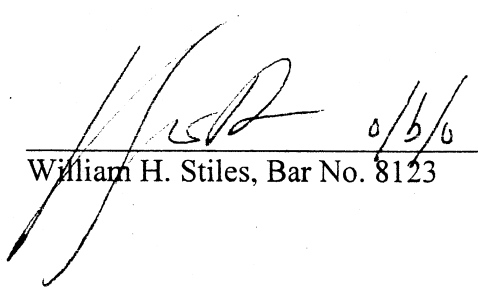
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CERTIFICATE OF SERVICE

I, William H. Stiles, attorney for the Maine State Chamber of Commerce, hereby certify that on this day I caused to be served the Maine State Chamber of Commerce Application to Intervene and Objection to Provisions in the Notice of Pending Proceeding and Hearing and draft Procedural Order upon the following:

- (1) Two Hard Copies via Hand Delivery to:
Board of Directors, Dirigo Health Agency
221 Water Street, Augusta, Maine.
- (2) One Electronic Copy to Lynn.C.Theberge@maine.gov
- (3) One Hard Copy via Hand Delivery to:
William H. Laubenstein, III, Esq.
Office of the Attorney General
6 State House Station
Augusta, Maine, 04333-0006
Counsel for Dirigo Health

Dated: February 9, 2006

 2/9/06

William H. Stiles, Bar No. 8123